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Calendar No. 612

99TH CONGRESS
2d Session

SENATE

REPORT
99-282

MF149

ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

together with

MINORITY VIEWS

ON

S. 239

APRIL 16 (legislative day, APRIL 8), 1986.—Ordered to be printed

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NINETY-NINTH CONGRESS

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ESTABLISHING CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF CAPITAL PUNISHMENT

APRIL 16 (legislative day, APRIL 8), 1986.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 239]

The Committee on the Judiciary, to which was referred the bill (S. 239) to establish Constitutional procedures for the imposition of the sentence of death, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. GENERAL STATEMENT AND HISTORY OF THE BILL

S. 239 was introduced by Senator Strom Thurmond (R-S.C.) on January 22, 1985, and referred to the Committee on the Judiciary and retained at the full committee level for consideration. The purpose of the bill is to establish a procedure for Federal capital offenses which will meet the constitutional requirements enunciated by the Supreme Court for the imposition of the death penalty.

At the time S. 538, a similar death penalty bill in the 98th Congress, was introduced, Senator Thurmond observed:[1]

> I submit that not only is capital punishment an appropriate penalty under the Eighth Amendment of the Constitution, it is also an appropriate penalty as a matter of legislative policy. * * * [T]he primary responsibility of society is the protection of its members so they may live out their lives in peace and safety. * * * [P]eople who commit [especially vicious and heinous murders] * * * have forfeited

[1] 129 Cong. Rec. S. 1406-S. 1409 (February 2, 1983 (daily ed.)). See also remarks of Senator DeConcini on capital punishment, 128 Cong. Rec. S. 161 (January 15, 1981 (daily ed.)).

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their own right to life. Every legislator, prosecutor, and court in this land should make the clearest statement that such inhuman conduct must not and will not be tolerated and that the lives of those who choose to perpetrate such violence will be swiftly and certainly taken from them. No lesser penalty will suffice.

The issue of capital punishment is not new to the Committee on the Judiciary. The Subcommittee on Criminal Laws and Procedures of this Committee held hearings in March and July of 1968 on a bill to abolish the death penalty for Federal offenses.[2] In 1972 the U.S. Supreme Court in *Furman* v. *Georgia*,[3] in effect, made the death penalty provisions in Federal and State law inoperative by holding that because of the unlimited discretion given to the judge and jury under the then existing statutes the death penalty had come to be imposed so arbitrarily and capriciously as to constitute cruel and unusual punishment in violation of the Eighth Amendment. At the time of the *Furman* decision, Federal law authorized the death penalty for six categories of offenses: espionage, treason, first degree murder, felony-murder, rape and kidnaping (when the victim was not liberated unharmed or when the kidnaping was committed during a bank robbery.[4]

The challenge set by the Court for the U.S. Congress (and the State legislatures) was not so much one of specifying those offenses for which the death penalty should be authorized—Federal law, as noted above, already did this—but one of designing a procedure and establishing criteria for imposition of the death penalty that would bring the otherwise "arbitrary and capricious" result flowing from unfettered discretion within constitutional bounds.

As a result of the *Furman* decision, Senator Roman L. Hruska, (R–Neb.), joined by Senator John L. McClellan (D–Ark.), introduced S. 1401 in the 93rd Congress on March 27, 1973, to provide constitutional procedures and criteria for imposition of the death penalty for most of the Federal offenses then authorizing the death penalty.[5] Hearings were held on the legislation in April, June, and July

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[2] *To Abolish the Death Penalty*, Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 90th Cong. 2d Sess. (1968).

[3] 408 U.S. 238 (1972).

[4] See 18 U.S.C. 32–34 (destruction of aircraft or aircraft facilities and motor vehicles or motor vehicle facilities where death results); 18 U.S.C. 351(a) (murder of a Member of Congress, a Member of Congress-elect, a Supreme Court justice, or certain high executive branch officials); 18 U.S.C. 351(b) (kidnaping a Member of Congress, Member of Congress-elect, a Supreme Court Justice, or certain high executive branch officials, where death results); 18 U.S.C. 794 (espionage); 18 U.S.C. 844 (d), (f), and (i) (explosive offenses where death results); 18 U.S.C. 1111 (murder in the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 1114 (murder of specified Federal officials and employees); 18 U.S.C. 1201 (kidnaping where the victim was not liberated unharmed); 18 U.S.C. 1716 (injurious articles as nonmailable where death results); 18 U.S.C. 1751(a) (murder of the President, President-elect, Vice President, the officer next in order of succession to the President, or certain high White House officials); 18 U.S.C. 1751(b) (kidnaping of President, Vice President, the officer next in order in succession to the Presidency, where death results); 18 U.S.C. 2031 (rape in the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 2381 (treason); 18 U.S.C. 1992 (destruction of trains or train facilities where death results); 18 U.S.C. 2113(c) (murder or kidnaping in the course of a bank robbery); and 49 U.S.C. 1172 (aircraft hijacking where death results). When the kidnaping section was revised in other respects in 1972 (Public Law 92-539), the death penalty language was dropped as superfluous in light of the *Furman* decision.

[5] The bill eliminated the death penalty for rape and limited the penalty in kidnaping to situations in which death resulted. It should also be noted that both of the massive bills to reform the Federal criminal laws (S. 1 and S. 1400, 93d Cong., 1st Sess.) contained provisions to meet the constitutional problems raised by *Furman*.

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of 1973.[6] On March 1, 1974, the Senate Committee on the Judiciary reported S. 1401 with amendments [7] and the Senate passed the measure on March 13, 1974, by a vote of 54 to 33.[8] The House did not act on the bill.

While a number of bills providing for capital punishment were introduced in the 94th Congress, action on these measures was deferred until decisions were rendered in a group of post-*Furman* cases pending in the Supreme Court. In 1976, the Supreme Court decided this group of landmark death penalty cases—*Gregg* v. *Georgia*,[9] *Proffitt* v. *Florida*,[10] *Jurek* v. *Texas*,[11] *Woodson* v. *North Carolina*,[12] and *Roberts* v. *Louisiana* [13]—in which the death penalty was held constitutional when imposed under certain procedures and criteria which guarded against unfettered discretion condemned in *Furman*, but which retained the important flexibility to consider the aggravating and mitigating factors of each case. Mandatory death penalty statutes were struck down.[14]

In 1977, a bill (S. 1382), that reflected the latest decisions by the Supreme Court, was introduced by Senator McClellan and 19 cosponsors. The Subcommittee on Criminal Laws and Procedures, following hearings,[15] reported the bill with minor amendments to the full committee. The Committee held additional hearings in April and May 1978,[16] primarily to explore the implications with respect to the applications of the death penalty to treason and espionage posed by a June 1977 Supreme Court case holding unconstitutional the application of the death penalty to the nonfatal rape of an adult woman.[17] The Committee failed to report the measure to the Senate.

In the 96th Congress, Senator Dennis DeConcini, (D-Ariz.), joined by Senator Thurmond, introduced a bill (S. 114) to enact a constitutional procedure for imposition of the death penalty similar to the predecessor bills.[18] The bill was reported by the Committee on January 17, 1980.[19] The Senate did not consider the measure further.

In the 97th Congress, Senator DeConcini, joined by Senator Thurmond, again introduced a capital punishment bill (S. 114)[20] and

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[6] *Imposition of Capital Punishment*, Hearings before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 93d Cong., 1st Sess. (1973).

[7] S. Rept. No. 93-721, 93d Cong., 2d Sess. (1973).

[8] 120 Cong. Rec. S 3721 (May 13, 1974 (daily ed.)). It should be noted that similar responses to the *Furman* decision were occurring in the State legislatures. By the end of the 1970s, at least 35 State legislatures had enacted new laws attempting to meet the objections of the Supreme Court by removing the imposition of the death penalty from the unguided discretion of the judge and jury. In addition, the United States Congress enacted antihijacking legislation providing for procedures for imposition of the death penalty for aircraft hijacking where death results (see section 105 of the Antihijacking Act of 1974, P.L. 93-366 (August 6, 1974); 49 U.S.C. 1473(c)), but failed to act on general legislation (S. 1401) to cover Federal murder, treason, and espionage.

[9] 428 U.S. 153 (1976).

[10] 428 U.S. 242 (1976).

[11] 428 U.S. 262 (1976).

[12] 428 U.S. 280 (1976).

[13] 428 U.S. 325 (1976).

[14] *Woodson* v. *North Carolina*, *supra*, note 12; *Roberts* v. *Louisiana*, *supra* note 13.

[15] See *To Establish Constitutional Procedures for the Imposition of Capital Punishment*, Hearing before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 95th Cong., 1st Sess. (1977).

[16] See *To Establish Rational Criteria for the Imposition of Capital Punishment*, Hearings before the Committee on the Judiciary, United States Senate, 95th Cong., 2d Sess. (1978).

[17] *Coker* v. *Georgia*, 433 U.S. 584, decided on June 28, 1977, after the subcommittee hearings.

[18] See 125 Cong. Rec. S 417-S 420 (January 23, 1979 (daily ed.)).

[19] S. Rept. No. 96-554, 96th Cong., 2d Sess. (1980).

[20] See 127 Cong. Rec. S 161-S 163 (January 15, 1981 (daily ed.)).

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further hearings were held on the subject.[21] the bill was reported to the Senate by the Committee on the Judiciary by a vote of 13 to 5 on July 1, 1981,[22] but no further action was taken by the Senate.

In the 98th Congress, three capital punishment bills, S. 538,[23] title X of S. 829 [24] and S. 1765,[25] containing substantially the same provisions, were introduced. Hearings were held on S. 829 [26] and related bills with the Committee reporting an original bill, S. 1765, on August 4, 1983. S. 1765 passed the Senate on February 6, 1984, by an overwhelming vote of 67 to 9. The House did not act on this bill.

In this Congress, Senator Thurmond introduced S. 239, which is similar to the capital punishment bill (S. 1765) that passed the Senate by a wide margin last Congress. On September 24, 1985, the Committee held a hearing to receive further comment on S. 239. The Committee felt that only one hearing was necessary due to the numerous hearings previously held on bills similar to S. 239. The Committee considered this bill on November 14, 1985, and February 20, 1986, at which time numerous amendments were offered. Therefore, the Committee expects that some amendments such as the so-called Klinghoffer amendment that would impose the death penalty in certain hostage-taking situations, will be offered when this bill is considered by the full Senate.

II. The Provisions of S. 239, as Reported

S. 239 is this Congress, as were the predecessor bills, is designed to establish constitutional procedures to guide the discretion of the jury or judge in determining whether to impose the death penalty.

The bill established a bifurcated procedure for imposing a sentence of death which would consist of a hearing to determine the guilt or innocence of the defendant and a second hearing to determine whether to impose the death penalty on a guilty defendant.

In order to seek a sentence of death, the attorney for the government would be required to give notice to the defendant a reasonable time before the trial that the government intends to seek a sentence of death. The attorney for the government must also identify in that notice the statutory aggravating factor or factors the government intends to prove. The sentencing hearing would be held before the same jury which determined that the defendant was guilty or if the defendant requests and the attorney for the government agrees; the trial judge alone.

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[21] *Capital Punishment*, Hearings before the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (1981).

[22] S. Rept. No. 97-143, 97th Cong., 1st Sess. (1981).

[23] 129 Cong. Rec. S. 1407 (February 22, 1983 (daily ed.)).

[24] S. 829, the Comprehensive Crime Control Act of 1983, was introduced on March 16, 1983, by Senators Thurmond and Laxalt, at the request of the administration. Supra note.

[25] The Committee ordered the text of S. 1765 reported to the Senate as an original bill on July 26, 1983. Since an original bill may not be reported with cosponsors, the text of the bill approved by the Committee was simultaneously introduced, referred to Committee, and reported (S. 1765). Original cosponsors were Senators Laxalt, DeConcini, Hatch, Garn, Helms, Simpson, Trible, Zorinsky, Grassley, East, Specter, and Domenici.

[26] *The Comprehensive Crime Control Act of 1983*. Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 98th Cong., 1st Sess. (1983) (statement of the Department of Justice, pp. 95-102; statement of the American Civil Liberties Union appendix II.

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After a verdict of guilty is returned, the factfinder in its deliberations held after the sentencing hearing would have to make a series of determinations before a sentence of death could be imposed.

First, in certain specific crimes, the factfinder must determine that special threshold requirements exist. If none is found to exist then a sentence other than death would have to be imposed.

If the required threshold factors are found to exist, the jury (or judge) would have to make special findings as to the existence of statutory aggravating and mitigating factors presented at the sentencing hearing. Every member of the jury must believe at least one of the presented statutory aggravating factors exists, but only those factors believed to exist by a majority of the jury could be considered in the final weighing. A majority of the jury must also agree that a specific mitigating factor exists in order for it to be considered in the final deliberation. If no statutory aggravating factors are found to exist, then a sentence other than death would have to be imposed.

Finally, if at least one statutory aggravating factor is found to exist by a majority of the jury, the deliberation moves to a third step. Here the jury (or judge) must weigh all the statutory aggravating and mitigating factors found to exist along with any nonstatutory aggravating and mitigating factors presented at the sentencing hearing. After weighing all of these factors, the jury (or judge) would then decide whether the death penalty should be imposed. The bill would leave unchanged the current substantive law regarding offenses that are punishable by the imposition of the death penalty, with two exceptions: S. 239 would authorize the death penatly (1) for certain attempts to assassinate the President and (2) for murder committed by an inmate serving a life term in a Federal correctional institution.[27] This bill, as amended by the Committee, also contains a new provision which prohibits the imposition of a sentence of death on a person who has less than 18 years of age at the time of the offense.

The procedure set forth in the bill provides that the hearing would normally be before the same jury which set for the trial or, if both parties agree, before the judge. After both sides have had an opportunity to present all relevant information, the jury or judge would make special findings as to whether the statutory requirements for imposition of the death penalty are met. Procedurally, this would require the factfinder to determine the existence of stat-

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[27] See list of current Federal statutes, *supra* note 4 indicating that treason, espionage, and most Federal homicides now purport to carry the death penalty. Several current Federal offenses enacted or modified after the *Furman* decision—murder of a foreign official, an official guest of the United States, or internationally protected person (18 U.S.C. 1116) and kidnaping where death results (18 U.S.C. 1201)— are changed by the bill to provide for the death penalty. On the other hand, several current Federal nonfatal offenses—rape (18 U.S.C. 2031) and kidnaping in the course of a bank robbery (18 U.S.C. 2113(e))—are amended by the bill to eliminate reference to the death penalty.

The provision to provide the death penalty for an aggravated attempt to assassinate the President was first offered by Senator Thurmond in the 97th Congress. Senator Specter offered the proposal with regard to murder by an inmate in the 98th Congress. Both of these provisions are discussed in more detail *infra*.

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utory aggravating and mitigating factors as basis for proceeding to the ultimate determination of the penalty to be imposed.[28]

The statutory mitigating factors to be considered include the following factors as applied to the defendant: mental problems or pressures, substantial duress, and/or the extent of the defendant's involvement in the offense.[29]

The aggravating factors vary depending on the nature of the offense. Aggravating factors relating to treason and espionage include a past conviction for an offense involving treason or espionage, whether the offense created a grave risk or substantial danger to the national security, and whether the offense created a grave risk of death to another person.[30]

With respect to imposition of the death penalty for a homicide, i.e., murder, felony-murder, or accomplice liability, as well as an attempt to kill the President, the bill provides that a threshold determination must be made before proceeding to consider other factors relevant to imposing the death penalty. If the offense is an attempt to kill the President, the factfinder must find that actual bodily injury to the President resulted from the attempt or that the attempt came "dangerously close" to causing the death of the President.[31] If the offense is a homicide, the factfinder must find that the defendant (1) intentionally killed the victim; (2) intentionally inflicted serious bodily injury that resulted in the death of the victim; or (3) intentionally participated in an act contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense and the victim died as a direct result of the act.[32] This language conforms to the Court's holding in *Enmund* v. *Florida* as to when a person convicted of felony-murder may receive a sentence of death.[33] If the judge or jury fails to find the existence of one of these threshold criteria, the death penalty cannot be imposed for homicide or an attempt to kill the President.

Once the applicable threshold factor is found to exist, the statutory aggravating factors for homicide are relevant as to whether the death penalty may be imposed. These factors include existence of repeated serious violent crimes by the defendant; or commission of the offense in an especially henious, cruel, or depraved manner; or commision of the offense for hire; or against United States or foreign officials most likely to be the target of assassination, kidnaping and terrorism.[34] Language similar to that describing one of

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[28] It should be noted that S. 239 as introduced and reported in this Congress, makes it clear that the jury or judge may consider nonstatutory mitigating and aggravating factors in the ultimate decision on whether to impose the death penalty. This was one of the characteristics of the statute unheld in *Gregg* v. *Georgia* and later constitutionally mandated in *Locket* v. *Ohio*. 438 U.S. 586 (1978), with respect to mitigating factors.

The Committee also amended the bill to make it clear that the factfinder must consider all non-statutory mitigating factors that are presented to it. This was the intent of the bill as introduced. Further, the factfinder would also have to consider any nonstatutory aggravating factors.

[29] See proposed 18 U.S.C. 3592(a).

[30] See proposed 18 U.S.C. 3592(b).

[31] See proposed 18 U.S.C. 3591(b).

[32] See proposed 18 U.S.C. 3591(c).

[33] 458 U.S. 782 (1982). The Supreme Court recently affirmed its holding in *Enmund* in *Cabana* v. *Bullock*, 106 S. Ct. 689, 697 (1986).

[34] See proposed 18 U.S.C. 3592(c).

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these factors—that the defendant committed the homicide "in an especially heinous, cruel, or depraved manner"—has been attacked as unconstitutional for vagueness. In *Godfrey* v. *Georgia*,[35] the Supreme Court noted that such an aggravating circumstances was held not to be unconstitutional on its face in *Gregg*, but a majority concluded that the Georgia Supreme Court had adopted such a broad and vague construction of the language as to violate the Eighth and Fourteenth Amendments. In reaching this conclusion, the plurality opinion, indicating that torture, aggravated battery, the deliberate prolonging of suffering, or the serious physical abuse of the victim before inflicting death would suffice to narrow the concept to within constitutional bounds, nevertheless observed that the killings committed by Godfrey "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." [36]

The Committee adopts the language "especially heinous, cruel, or depraved manner" with these limitations in mind. This aggravating factor is not intended to be a catch-all concept to be used to impose the death penalty on any person found guilty of murder. On the other hand, to the extent that an extraordinary depravity is evidenced by the circumstances, such as the execution-style killing of a stranger for the thrill of it or the extended terrorizing of a victim before the execution, the Committee has concluded that it would be constitutional to view the concept of "depravity" as broader than a "novel physical torture requirement" and intends for it to be so construed in this measure.[37]

For the offense of treason or espionage, the jury would be required to determine by unanimous vote that a statutory mitigating or aggravating factor exists, although it is unnecessary that there be a unanimous vote on any one specific mitigating or aggravating factor if a majority of the jury finds the existence of a specific factor.[38] If no aggravating factor is found to exist, the court would impose a sentence, other than death, authorized by law.[39] If the jury agrees, as indicated, that at least one aggravating factor exists, the jury by unanimous vote would have to then determine that the aggravating factor or factors alone justify a sentence of death.[40] The Committee amended the bill to give the factfinder the discretion not to impose a sentence of death even after the factfinder has determined in a hearing held pursuant to section 3593 that such a sentence is justified.[41] Previous death penalty bills did not give the factfinder this further element of discretion. The Committee believes, however, that this amendment would not affect the constitutionality of the bill because it does not give the factfinder unfettered discretion to impose a sentence of death, as discussed in *Furman*. The Committee recognizes that the factfinder exercises its discretion in determining whether statutory factors exist and in weighing those factors. This discretion is not impermissible under

[35] 446 U.S. 420 (1980).
[36] *Id.* at 429–431, 432.
[37] *Id.* at 443 (Chief Justice Burger, dissenting).
[38] See proposed 18 U.S.C. 3593(d).
[39] See proposed 18 U.S.C. 3594.
[40] See proposed 18 U.S.C. 3593(e).
[41] See proposed 18 U.S.C. 3591.

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Furman because the factfinder in making its decision must adhere to the specific guidelines as set forth in the bill. Likewise, this amendment gives the jury discretion; however, that discretion is restricted only to a determination that the death penalty should not be imposed, and therefore would not run afoul of *Furman*.

In the instances in which the jury is the sentencing body, this amendment does not give the judge the discretion to disregard the jury's determination that a sentence of death should be imposed. If the factfinder finds that the death penalty is justified, the court is directed to impose a sentence of death.[42]

For homicide offenses, as noted above, the jury must first find by unanimous verdict that one of the threshold circumstances as specified in section 3591 (b) or (c) existed. This subsection is designed to ensure a certain culpability level on the part of the defendant with respect to homicide or the attempt on the life of the President of the United States. If this requirement is not satisfied, the court would impose a sentence, other than death, authorized by law. However, if this requirement is satisfied, the jury must then determine by unanimous vote that at least one of the statutory mitigating or aggravating factors applicable to homicide exists, although it is unnecessary that there be a unanimous vote on any specific mitigating or aggravating factor if a majority of the jury finds the existence of such a specific factor.[43] Upon the failure to find at least one of the aggravating factors, the court has imposed a sentence, other than death, authorized by law.[44] On the other hand, if the jury finds as indicated that at least one of the aggravating factors exists, it must by unanimous vote determine, in light of all the information, whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or, in the absence of any mitigating factors, whether the aggravating factor or factors alone, justify a sentence of death.[45]

As discussed above, even though the factfinder may determine, after weighing all of the factors, that a sentence of death is justified, the factfinder has the discretion not to impose such a sentence.[46] If the jury finds that the death penalty is justified, the court is directed to impose a sentence of death.[47]

The bill further provides that the defendant shall have a right to appeal the sentence and that such review shall have priority over all other cases.[48] In order to reaffirm the sentence, the appellate court must determine that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor and that the evidence supports the special findings.[49]

The Committee is convinced that the procedures proposed in S. 239 for the imposition of the death penalty successfully meet the constitutional requirements of the Supreme Court cases. Primarily the witnesses who appeared in opposition to the bill did so on

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[42] See proposed 18 U.S.C. 3594.
[43] See proposed 18 U.S.C. 3593(d).
[44] See proposed 18 U.S.C. 3594.
[45] See proposed 18 U.S.C. 3593(e).
[46] See proposed 18 U.S.C. 3591.
[47] See proposed 18 U.S.C. 3594.
[48] See proposed 18 U.S.C. 3595.
[49] *Ibid.*

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moral or religious grounds and did not challenge the constitutionality of the basic procedures. The representative of the American Civil Liberties Union, while criticizing the bill as clearly unconstitutional in a limited number of the specifics, generally maintained that the death penalty under all circumstances is cruel and unusual punishment prohibited by the Eighth Amendment and, therefore, opposed the enactment of a Federal death penalty statute altogether.[50] This indicates a more general disagreement with the Court's decision in *Furman*.

A representative of the Department of Justice, appearing in support of previous capital punishment legislation, made the following observation: [51]

> * * * Both the President and the Attorney General have repeatedly indicated in public statements that they support the imposition of the death penalty in carefully circumscribed conditions for the most serious crimes. In our view, the death penalty is warranted for two principal reasons.
>
> First, while sociological studies have reached differing conclusions, common sense tells us that the death penalty does operate as an effective deterrent for some crimes involving premeditation and calculation, and that it thus will save the lives of persons who would otherwise become the permanent and irretrievable victims of criminal misconduct.
>
> Second, society does have a right—and the Supreme Court has confirmed that right—to exact a just and proportionate punishment on those individuals who deliberately flout its laws; and there are some offenses which are so harmful and so reprehensible that no other penalty, not even life imprisonment without the possibility of parole, would represent an adequate response to the defendant's conduct.
>
> Like the authors of S. 114, therefore, Mr. Chairman, this administration supports the death penalty in certain instances involving violation of Federal criminal statutes * * *
>
> * * * * * *
>
> Our initial examination of this bill indicates that it too would likely pass constitutional muster and is of such a scope and nature as to constitute an appropriate framework for the restoration of the death penalty into the Federal criminal justice system—an event which we agree with the sponsors of this legislation is overdue.

The Committee has previously considered the constitutional implications for application of the death penalty to treason and espionage not resulting in the death of another raised by the Supreme Court in *Coker* v. *Georgia*,[52] which held that imposition of the

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[50] Capital Punishment Hearings, *supra* note 421 at 128–132, 139–230.
[51] *Id.* at 34–35.
[52] *Supra* note 17.

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death penalty for rape of an adult woman where death did not result was "grossly disproportionate and excessive punishment" forbidden by the Eighth Amendment as cruel and unusual punishment. Treason and espionage are important national defense offenses which are generally considered uniquely Federal in nature; however, such offenses are a part of the laws of most countries and commonly, as in current United States law, carry the death penalty as an authorized sentence, although the imposition process has constitutional flaws. The most troublesome problem is the treatment of peacetime espionage. To meet the concerns that underpin *Coker*, the Committee limits the death penalty for peacetime espionage to situations where the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy. The Committee has concluded that it would be constitutional to impose the death penalty for treason and espionage offenses, and it is warranted under the narrow circumstances provided in S. 239.[53]

The Committee, in the 97th Congress, considered the constitutionality of Senator Thurmond's proposal to provide the death penalty for an unsuccessful attempt to kill the President of the United States if the attempt results in bodily injury to the President or otherwise comes "dangerously close" to causing the death of the President. As with nonfatal treason and espionage, application of the death penalty to an attempt to kill the President may raise issues of disproportionate and excessive punishment under *Coker*. A number of witnesses in the hearings held in the 97th Congress, including Professor David Robinson with the George Washington University School of Law,[54] testified that an attempt upon the life of the President as the Head of State could in their judgment be constitutionally punishable by death. The Department of Justice, Office of Legal Counsel, provided an opinion on the issue in which the Office concluded: [55]

> * * * We believe that such a statute, if drafted narrowly and with extreme care, might well be upheld by the Supreme Court.
>
> * * * * * *
>
> As the most powerful and visible of the nation's leaders, the President maintains a unique position within the Federal Government. As Commander-in-Chief of the armed forces, he discharges unique responsibilities for the security of the country. As head of the Executive Branch, he is entrusted with the authority of coordinating and executing all laws of the United States. For these reasons, an assault on the President threatens the national security in a distinctive fashion.

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[53] Capital Punishment Hearings, *supra* note 21 at 23–25.
[54] *Id.* at 67–68.
[55] *Id.* at 54, 64–65.

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The Department goes on to distinguish such an attempt from an attempt on a private citizen and states in conclusion:

> that the unique nature of the office of the President of the United States furnishes support for the view that an attempted assassination of the President can be subjected to the death penalty.
>
> * * * * *
>
> Any such statute should be narrowly drafted to include cases in which the defendant's intent was unambiguous and the crime was almost completed. Such a statute would be more likely to be upheld if an element of the crime was the actual commission of some bodily injury to the President.
>
> We believe that, if a capital punishment statute were drafted to include such injury as part of the offense, or possibly even if it were otherwise narrowly confined to nearly successful attempts, the statute might well be found constitutional. The fact that England and a number of other countries have historically applied the death penalty to an attempted murder of the head of State, together with the distinctive responsibilities of the President in our constitutional scheme do, in our view, provide support for a conclusion that the death penalty for an attempt on the life of the President is not disproportionate within the meaning of *Coker*.

The proposal, based upon the opinion of the Office of Legal Counsel and adopted by the Committee, would provide for the death penalty for attempted assassination of the President—a deliberate, premeditated act intending murder—only in the limited circumstances where the attempt results in bodily injury to the President or otherwise comes "dangerously close" to causing the death of the President. Admittedly, the "dangerously close" language does not track a precise line. The Committee concluded, however, that the death penalty would be constitutional not only for situations resulting in bodily injury to the President, but to exceptional "core" cases not resulting in actual injury where the defendant's unambiguous purpose is to kill the President and the effort fortuitously fails after the deadly force is set in motion in close proximity to the President.

CAPITAL PUNISHMENT AS A MATTER OF LEGISLATIVE POLICY

Despite the Supreme Court's ruling that the death penalty is not prohibited by the Eighth Amendment of the Constitution, the basic issue of the use of the death penalty is so important that the Committee feels compelled to reiterate here the justifications for its use in the heinous crimes under the particular circumstances provided in S. 239.

The conclusion in favor of the retention of capital punishment for these crimes has its basis in two underlying beliefs: First, the belief that the primary responsibility of society is the protection of its members so that they may live out their lives in peace and safety. Indeed, this is one of the main reasons why any society

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exists. Where the safety of its citizenry can no longer be guaranteed, Society's basic reason for being disappears. In providing its members protection, society must do what is necessary to deter those who would break its laws and punish those who do so in an appropriate manner. Second, it is based upon the belief that one purpose of our criminal law system is to promote respect for the lives and property of others. As previously noted by Senator Thurmond: [56]

> The death penalty must be restored if our criminal justice system is to effectively control the increasing number of violent crimes of terror. The confidence of the American people in our criminal justice system must also be reclaimed and the imposition of the death penalty can restore such confidence.
>
> Mr. President, people who commit violent crimes have forfeited their own right to life. Justice demands that such inhuman action cannot be tolerated. This bill would permit the death penalty in certain instances and, I hope, provide protection for the innocent victims of violent crimes.

The Committee also subscribes to the statement of Professor Walter Berns [57] that:

> * * * [t]he purpose of the criminal law is not merely to control behavior—a tyrant can do that—but also to promote respect for that which should be respected, especially the lives, the moral integrity, and even the property of others. In a country whose principles forbid it to preach, the criminal can make a moral statement and, thereby, hope to promote this respect. To be successful, what it says—and it makes this moral statement when it punishes—must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made to be awful or awe inspiring is to entitle it to inflict the penalty of death.* * *

It is the Committee's conclusion that the sentence of capital punishment applied to the more serious offenses fulfills these functions.

DETERRENCE

The question of the deterrent effect of capital punishment has probably been the one point most debated by those favoring the abolition of the penalty and those desiring its retention. Several studies have been conducted purporting to show the absence of any correlation between the existence of the penalty and the number of capital crimes committed in a particular jurisdiction. the argument

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[56] Statement of Senator Strom Thurmond on the introduction of S. 114 in the 96th Congress. 125 Cong. Rec. S 419 (January 23, 1979 (daily ed.)).

[57] Walter Berns, Resident Scholar, The American Enterprise Institute for Foreign Policy Research, *Defending the Death Penalty*, Crime and Delinquency, October 1980, reprinted in Capital Punishment Hearings, *supra* note 21 at 260.

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then follows that, since there exists no such relationship, the penalty serves no legitimate social purpose and should not be imposed.

If the absence of any correlation between the existence of the penalty and the frequency of capital crimes could actually be proved by these studies, the argument for abolition would be much stronger. Although entitled to consideration, however, the value of these studies is seriously diminished by the unreliability of the statistical evidence used, the contrary experience of those in the field of law enforcement, and the inherent logic of the deterrent power of the threat of death.

With regard to the statistical evidence, the first and most obvious point is that those who are, in fact, deterred by the threat of the death penalty and do not commit murder are not included in the statistical data. There is no way to determine the number of such people. Secondly, even those favoring abolition agree that the available evidence on the subject of deterrence is, at best, inadequate.

Possibly the greatest difficulty with the available statistical data is that the only figure available to judge the effectiveness of capital punishment is the "murder and nonnegligent manslaughter" figure reported annually by the Federal Bureau of Investigation; and this figure does not provide sufficient evidence from which to draw a conclusion.

In short, the available data on this question is at best inconclusive.

In the absence of reliable statistical evidence, great weight must be placed on the experience of those who are most frequently called upon to deal with murderers and potential murderers and who are thus in the best position to judge the effectiveness of the remedy—our law enforcement officials. The vast majority of these officials continue to favor the retention of the death penalty as a deterrent to violent crime.

As Norman Darwick, Executive Director, International Association of Chiefs of Police, expressing the views of the Association, testified before the Committee: [58]

> The Association favors the imposition of the death penalty for premeditated murder, murder committed during the perpetration of felonies and the killing of law enforcement officers and correctional officials while performing their duties. We strongly believe that capital punishment is a deterrent to the commission of certain crimes, particularly premeditated murder, murder committed during the perpetration of felonies and the killing of law enforcement officers and prison guards.
>
> • • • • •
>
> Further, there is no evidence that shows that the death penalty is not a deterrent. Rational men fear death more than anything else. The use of the death penalty, therefore, has a potentially greater general deterrent effect than any other punishment.

[58] *Id.* at 114, 119.

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The issue, for our purposes here, has been definitely resolved by the Supreme Court in the *Gregg* case where it concluded that it is appropriate for a legislature to consider deterrence as a justification for the imposition of the death penalty: [59]

> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a signficant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

But the death penalty ought not be thought of solely in terms of individual deterrence. It also has value in terms of social or general deterrence as well. By associating the penalty with the crimes for which it is inflicted, society is made more aware of the horror of those crimes, and there is instilled in its members the desire to avoid such conduct.

INCAPACITATION

The incapacitating effect of capital punishment is clear. Obviously those who suffer this penalty are unable to commit similar crimes in the future. The question, then, becomes one of necessity. Is the death penalty necessary to adequately protect society in the future from the possible actions of those who have already committed capital crimes? The Committee is of the opinion that, in certain circumstances, it is.

In some cases, imprisonment is simply not a sufficient safeguard against the future actions of criminals. Some criminals are incorrigibly anti-social and will remain potentially dangerous to society for the rest of their lives. Mere imprisonment offers these people the possibility of escape or, in some cases, release on parole. The Committee recognizes that under the Sentencing Reform Act of 1984 parole will be abolished, however, the possibility of escape would still exist. Even if they are successfully imprisoned for life, prison itself is an environment presenting dangers to guards, inmates, and others. In each of these cases, society is the victim. Basically, there is no satisfactory alternative sentence for these individuals. Life imprisonment without parole, although at first appearing to be a reasonable answer, is in reality highly unsatisfactory. Such a sentence greatly increases the danger to guards and to other prisoners who come into contact with those who have been so sentenced.

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[59] *Gregg* v. *Georgia*, *supra* note 9, 428 U.S. at 185–86 (footnote omitted).

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It cannot be overemphasized that it is not the Committee's desire to see capital punishment utilized as an alternative to efforts at rehabilitation. This simply is not the case. The members of the Committee recognize that still greater attempts must be made to enable our prison system to achieve its goal of restoring productive and useful individuals to society. We here discuss only a minute class of extremely dangerous persons.

RETRIBUTION

The Committee finds also that capital punishment serves the legitimate function of retribution. This is distinct from the concept of revenge in the sense of the "eye for an eye" mentality; [60] through retribution that society expresses its outrage and sense of revulsion toward those who undermine the foundtions of civilized society by contravening its laws. It reflects the fact that criminals have not simply inflicted injury upon discrete individuals; they have also weakened the often tenuous bonds that hold communities together.

The retributive function of punishment in general was discussed by Walter Berns: [61]

> * * * [W]e in the United States have always recognized the legitimacy of retribution. We have schedules of punishment in every criminal code according to which punishments are designed to fit the crime, and not simply to fit what social science tells us about deterrence and rehabilitation: the worse the crime, the more severe the punishment. Justice requires criminals (as well as the rest of us) to get what they (and we) deserve, and what criminals deserve depends on what they have done to us.

It is the view of the Committee that these feelings rightly and justly warrant the imposition of capital punishment under some circumstances.

The people who take the lives of others in an unjustified manner may sometimes be subject to the extreme sanction of capital punishment reflects a social consensus that places great sanctity on the value of human life. It is a consensus that holds that individual offenders are responsible and accountable beings, having it within themselves to conduct themselves in a civilized manner. It is also a consensus that holds that there is no offense more repugnant and more heinous than the deprivation of an innocent person's life.

Murder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought to also differ in kind. It must acknowledge the invio-

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[60] It is appropriate to note at this point that the Judaic concept of an "eye for an eye" was not, in fact, intended as an approval of revenge or even expressive of a vindicative system of justice. Quite the contrary, this concept was intended as a mitgating element designed to prevent excessiveness to ensure that the punishment fit the crime. Thus, if any offender took out another's eye, he was to lose his own. But he was not to suffer any greater loss than that such as his life. As with the other objectives of the criminal justice system, the retributive objective must be imposed in such a manner as to fit the crime. For more Bibical commentary on punishment and its purposes, see also Romans 12:19; 13:14; Numbers 35:16–18; Genesis 9:4–6; Exodus 20:13; 21:12–14; Leviticus 24:17; Numbers 35:30–4; Deuteronomy 17:6–7; 19:11–13; 19:4–6, 10; Isaiah 59:14–18; Matthew 5:17–22; Romans 12:19–21; 13:1; Matthew 5:7; 6:12; 10:28; Palms 18:25–6.

[61] Capital Punishment Hearings, *supra* note 21 at 256.

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lability and dignity of innocent human life. It must, in short, be proportionate. The Committee has concluded that, in the relatively narrow range of circumstances outlined in this bill, the penalty of death satisfies that standard.

Apart from its legitimacy as one of the purposes of punishment, questions have arisen with respect to the constitutional validity of retribution as a basis for punishment, specifically capital punishment. This question was addressed by the Supreme Court in the *Gregg* case: [62]

> In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.
>
> "The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a free society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law," *Furman* v. *Georgia, supra* at 308 (Stewart, J., concurring).
>
> "Retribution is no longer the dominant objective of the criminal law," *Williams* v. *New York* 337 U.S. 241, 248 (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. *Furman* v. *Georgia,* 408 U.S. at 394–5 (Burger, J., dissenting); *id.* at 452–4 (Powell, J., dissenting); *Powell* v. *Texas,* 332 U.S. at 531, 535–6. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

It is the conclusion of this Committee that it is not enough to proclaim the sanctity and importance of innocent life. Innocent life must be, and can only be, secured by a society that is willing to impose its severest penalty upon those who take such life. As observed by Professor Walter Berns: [63]

> We think that some criminals must be made to pay for their crimes with their lives, and we think that we, the survivors of the world they violated, may legitimately extract that payment because we, too, are their victims. By punishing them, we demonstrate that there are laws that bind men across generations as well as across (and within) nations, that we are not simply isolated individuals, each pursuing his selfish interests * * *.

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[62] *Gregg* v. *Georgia, supra* note 9, 428 U.S. at 183–184 (footnotes omitted).
[63] Walter Berns, *For Capital Punishment,* Harper's Magazine, p. 15, April 1979.

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POSSIBILITY OF ERROR

An argument that is often asserted in favor of abolition of capital punishment concerns the dangers of executing the innocent. It is pointed out that if such an error occurs, it is irremedial. The argument is then made that, since the cost of such a mistake is so great, the risk of permitting the death penalty to be imposed at all is unacceptable.

The Committee finds this argument to be without great weight, particularly in light of the procedural safeguards for criminal defendants mandated by the Supreme Court in recent years. The Court's decisions with respect to the rights of the individual, particularly those expanding the right to counsel, together with the precautions taken by any court in a capital case, have all but reduced the danger of error in these cases to that of a mere chance. Admittedly, however, due to the fallible nature of man, this possibility does continue to exist. Insofar as it does, it is the opinion of the Committee that this minimal risk is justified by the protection afforded to society by the death penalty. As stated in the minority report of the Massachusetts Special Commission: [64]

> We do not feel, however, that the mere possibility of error, which can never be completely ruled out, can be urged as a reason why the right of the State to inflict the death penalty can be questioned in principle. * * * All that can be expected of [human authorities] is that they take every reasonable precaution against the danger of error. When this is done by those who are charged with the application of the law, the likelihood that errors will be made descends to an irreducible minimum. If errors are then made, this is the necessary price that must be paid within a society which is made up of human beings and whose authority is exercised not by angels but by men themselves. It is not brutal or unfeeling to suggest that the danger of miscarriage of justice must be weighed against the far greater evils for which the death penalty aims to provide effective remedies.

PUBLIC OPINION

In arriving at a decision to support the death penalty, considerable weight was given to public opinion on the acceptability of the death penalty. Contrary to the frequently asserted statement that there is growing public opposition to capital punishment, examination of public opinion polls over the last ten years shows a remarkable rise in the number of Americans in favor of the death penalty. A March 1981 Gallup opinion poll revealed that public support for the death penalty for murder had reached its highest point in 28 years—and this poll was taken before the attempt on the President's life. Sixty-six percent—two in every three Americans—favored the death penalty for persons convicted of murder. In 1971, forty-nine percent of the public approved of capital punishment for murder. It appears from the polls, and from a flood of recent corre-

[64] McClellan, Grant S. ed., *Capital Punishment*, p. 81 (1961).

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spondence that a demand for the death penalty coincides with a greater public awareness of the crime problem.

SECTION-BY-SECTION ANALYSIS

Section 1 of the bill adds a new chapter 228 to title 18 of the United States Code consisting of sections 3591 through 3597, and makes necessary technical amendments as follows:

SECTION 3591. SENTENCE OF DEATH

Section 3591 provides that a defendant found guilty of treason, espionage, or a homicide or an attempt to kill the President of the United States under the specified circumstances, may be sentenced to death if, after consideration of the mitigating and aggravating factors applicable to the case in a post-verdict sentencing hearing, the factfinder determines beyond a reasonable doubt that imposition of a sentence of death is justified. The factfinder also has the discretion not to impose a sentence of death even though it may find that such a sentence is justified.

To be a capital homicide, the defendant must have intentionally killed the victim; intentionally inflicted serious bodily injury that resulted in the death of the victim; or intentionally participated in an act contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act. The last criteria is designed to meet the constitutional requirements for felony-murder as set forth in *Enmund*.[65]

The death penalty for an attempt to assassinate the President of the United States would only be available if the attempt resulted in bodily injury to the President or came dangerously close to causing the death of the President. These threshold criteria relate to the culpable involvement of the defendant in the commission of such offenses and restrict the death penalty to defendants with a high degree of culpable responsibility for the harm or attempted harm. Such restrictions are designed to meet the constitutional difficulties under *Coker* v. *Georgia* [66] and *Enmund* v. *Florida*.[67] The former case held that imposition of the death penalty for the nonfatal rape of an adult woman unconstitutional and thereby cast some doubt on the application of the death penalty to other nonfatal offenses. The latter case held, in a felony-murder and accomplice liability context, that the death penalty could not constitutionally be imposed on a defendant who did not have a high degree of culpable responsibility for the death. This section further provides that a sentence of death may not be imposed on any person who was less than 18 years of age at the time of the offense.

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[65] Supra, note 33.
[66] Supra note 17.
[67] Supra note 33.

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SECTION 3592. FACTORS TO BE CONSIDERED IN DETERMINING WHETHER A SENTENCE OF DEATH IS JUSTIFIED

Section 3592 sets forth the statutory mitigating and aggravating factors to be considered by the jury or judge in determining whether a sentence of death is justified and also requires the consideration of whether any non statutory mitigating and aggravating factors exist that might affect such determination.

Subsection (a) sets forth three statutory mitigating factors which are to be considered in determining whether to impose a sentence of death: (1) the fact that the defendant's mental capacity was significantly impaired, but not so impaired as to constitute a defense; (2) the fact that he was under unusual and substantial duress, although not such duress as to constitute a defense; and (3) the fact that the defendant was an accomplice whose participation in the offense was relatively minor.

It should be noted that a fourth mitigating factor—that the defendant was less than 18 years of age at the time of the offense—was set forth in prior bills.[68] This mitigating factor was dropped in order to conform with the Committee amendment that prohibits the imposition of a sentence of death upon any person who was less than 18 years of age at the time of the offense.

Subsection (a) also expressly states that the jury or judge shall consider whether any other mitigating factors exist.

Subsections (b) and (c) set forth the statutory aggravating factors for treason, espionage, homicide, and an attempt to assassinate the President. These aggravating factors do not define the instances in which the death penalty is authorized. This authorization is placed in the penalty provision of each individual capital offense and for the most part is already reflected in current law.[69]

These factors simply specify those aggravated instances of capital offenses where the statute will permit a jury to determine whether the death penalty is justified. These factors only affect the statutory availability of the death penalty in that they provide a second minimum requirement (in addition to conviction for a capital offense) before the jury may even consider whether the death penalty is justified.

Subsection (b) provides that in determining whether the death penalty is justified for treason (18 U.S.C. 2381) or espionage (18 U.S.C. 794), the jury or judge shall consider the following statutory aggravating factors in determining whether to impose a sentence of death: [70] (1) the defendant has been convicted of another offense in-

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[68] See proposed 18 U.S.C. 3592(a)(1) of S. 530, 98th Cong., 2nd Sess. (1983); proposed 18 U.S.C. S. 3562 A(a)(1) of S. 829, 98th Cong., 2nd Sess. (1983); proposed 18 U.S.C. S. 3592(a)(1) of S. 1765, 98th Cong., 2nd Sess. (1983); proposed 18 U.S.C. S. 3562 A(a)(1) of S. 114, 97th Congress, 1st Sess. (1981).

[69] See *supra* notes 5 and 30. The only offenses in current law that are changed to capital offenses by this bill are murder of a foreign official, an official guest, or internationally protected person, kidnaping where a death results, and attempted assassination of the President. The bill also creates the new Federal capital offense for murder committed by a person confined in a Federal correctional institution under a sentence for a term of life imprisonment. (See proposed 18 U.S.C. 1118 in section 9 of the bill).

[70] In determining the actual statutory aggravating factors before the trier-of-fact, this section must be read in conjunction with the requirement in sectioin 3593(a) that the government give timely notice of its intent to seek the death penalty and the statutory aggravating factor or factors it proposes to prove as justifying a sentence of death.

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volving espionage or treason for which a sentence of life imprisonment or death was authorized by statute; (2) he knowingly created a grave risk of substantial danger to the national security; or (3) he knowingly created a grave risk of death to another person.

Subsection (c) lists the statutory aggravating factors to be considered where the defendant is convicted of an attempt to assassinate the President under the circumstances specified in section 3591(b) or of a homicide under the circumstances specified in section 3591(c). These statutory aggravating circumstances are met where (1) the death, or the injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission or the attempted commission of, one of several exceptionally serious dangerous crimes, i.e., escape from penal custody, espionage, serious explosive offenses, murder by prisoner serving a life term, kidnaping, treason, and aircraft hijacking; (2) the defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute; (3) the defendant has previously been convicted of two or more Federal or State offenses with a penalty of more than one year imprisonment, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person; (4) the defendant knowingly created a grave risk of death to one or more persons in addition to the victim of the offense; (5) he committed the offense in an especially heinous, cruel, or depraved manner; (6) he procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; (7) he committed the offense for pay; (8) he committed the offense after substantial planning and premeditation to cause the death of another person or committed an act of terrorism; or (9) he committed the offense against one of certain designated public officials.

Except for the requirement that at least one aggravating factor exist, these statutory aggravating and mitigating factors in section 3592 are not mechanically determinative of the sentence to be imposed, as such factors are under some statutory schemes. Their purpose here is to focus the jury's consideration on the circumstances of the crime and the character of the individual defendant; to give the jury guidance as to which factors are particularly relevant to the sentencing decision; to offer the jury some procedural structure for their deliberations; to give the trail judge some basis for determining the relevance of evidence sought to be presented at trail; and to provide the appellate court, through the requirement of special findings, some additional basis on which to review the legality of the sentence.

Each of the subsections dealing with aggravating factors expressly provides that the jury or judge may consider whether any nonstatutory aggravating factor exists. As previously noted, a legislature may not constitutionally bar consideration of nonstatutory mitigating circumstances in deciding whether to impose the death penalty.[71] The Committee has concluded that, while the death pen-

[71] See *supra* note 28.

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alty should not be available unless at least one *statutory* aggravating factor is found to exist, the jury or judge should be able to consider *nonstatutory* aggravating factors, as well as statutory and nonstatutory mitigating factors, in determining ultimately whether the death penalty is justified.

As a matter of policy, the legislature should expressly designate only those aggravating factors deemed serious enough to justify the death penalty, but should not foreclose consideration of other relevant factors—mitigating or aggravating—to be weighted in considering the record as a whole.[72] This Congress, the Committee has gone one step further and amended the bill to make it clear that the judge or jury must consider all nonstatutory mitigating factors that are presented. Such an amendment is consistent with the intent of the bill as introduced. The Committee also believes that the judge or jury would have the same responsibility with respect to aggravating factors.

SECTION 3593. SPECIAL HEARING TO DETERMINE WHETHER A SENTENCE OF DEATH IS JUSTIFIED

Section 3593 sets forth the procedure for a special hearing to determine whether a sentence of death is justified for a conviction for an offense as specified in section 3591.

Subsection (a) provides that if the government believes that the circumstances of an offense described in section 3591 justify the death penalty under this chapter, it must give notice of this conclusion to the defendant and set forth the aggravating factor or factors it proposes to prove as justifying a sentence of death. The notice must be given by filing it with the court and serving it on the defendant a reasonable time before trial, before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause. The provision recognizes that unforeseen information may become available after notice is given by permitting the notice to be subsequently amended for good cause shown.

This notice provision would assure that the defense is given adequate notice and time to prepare for the post-conviction penalty hearing and would ensure that an appropriate *voir dire* would be conducted of the jury that comports with applicable Supreme Court cases. It also makes clear that the procedures adopted in this bill to impose the death penalty are only to be extended to the expensive and time-consuming sentencing hearing stage where the government, in fact, intends to seek the death penalty and to affirmatively carry the burden of proving the aggravating factor or factors alleged to be applicable to the case. While it can be argued that the defendant is always on notice in a capital case with respect to the possibility of a death penalty sentencing hearing, fairness and orderly pursuit of the death penalty in appropriate instances would be facilitated by pretrial notice without in any way prejudicing the government.

Subsection (b) states that when an attorney for the government has filed a notice as required under subsection (a) and a defendant

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[72] See *Gregg* v. *Georgia*, *supra* note 9, 428 U.S. at 197.

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is found guilty of an offense punishable by death, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge, shall conduct a separate sentencing hearing to determine the punishment to be imposed. No presentence report shall be prepared where a death penalty sentencing hearing is to be held.[73] The hearing shall be conducted (1) before the jury which determined the defendant's guilt; (2) before a new jury impaneled for the purpose of the hearing, if the original jury was discharged for good cause; or if the defendant was convicted upon a plea of guilty or by the court sitting without a jury; or if reconsideration of the initial sentence is necessary, such as when reversal on appeal occurs; or (3) before the court alone, upon motion of the defendant and with the approval of the government. A jury impaneled for the purpose of the sentencing hearing must consist of twelve members, unless the parties stipulate before the conclusion of the hearing that it shall consist of a lesser number and the court approves.

Subsection (c) deals with proof of mitigating and aggravating factors. Any information relevant to the sentence may be presented at the hearing, including information concerning any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcripts and exhibits, or relevant parts thereof, if the hearing is before a jury or judge not present during the trial. Any other relevant information may be presented by the parties regardless of its admissibility under the rules of evidence, except that the court should exclude information the probative value of which is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. Both parites must be permitted to rebut information presented and be afforded a fair opportunity to argue the issues posed by the hearing, with the government having the opening and closing argument. The burden of establishing the existence of any aggravating factor is on the government beyond a reasonable doubt, while the burden with respect to any mitigating factor is on the defendant by a preponderance of the information.

Subsection (d) deals with the return of special findings. It provides that the sentencing decision shall be made on the basis of the information received during the sentencing hearing. The factfinder is required to return special findings identifying whether any statutory mitigation or aggravating factor or factors concerning which information is presented in the hearing have been found to exist. The phrase "required to be considered under section 3592" is intended to make it clear that the special findings relate only to the statutory factors *required* to be considered and not to nonstatutory factors *permitted* to be weighed in the ultimate decision whether, on the record as a whole, the death penalty is justified. The jury must find the existence of a mitigating or aggravating factor by a unanimous vote, although it is unnecessary that there be a unanimous vote on any specific mitigating or aggravating factor if a ma-

[73] Under the procedures set out in this bill, the jury, or if there is no jury, the judge, must decide the issue presented—the existence of aggravating and mitigating factors and the justifiability of imposition of the death penalty—based solely upon information presented at the hearing. Therefore, the use of a presentence report is not necessary.

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jority of the jury finds the existence of such a specific factor. Thus, the requirement with respect to the existence of at least one statutory aggravating factor would be satisifed if the government alleged two such factors in its notice and the jury agreed by a majority vote that each of the factors existed and each of the jurors agreed that at least one of the factors existed.

Subsection (e) deals, in the event a required aggravating factor is found, with the jury decision as to whether on the record as a whole the death penalty is justified. In such a case, the jury or court must then consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify the death penalty, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient to justify the death penalty. Based upon this consideration, the jury, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified. In the event that the factfinder determines that a sentence of death is justified, the factfinder has the discretion not to impose the death penalty. This provision does not give the judge the discretion to overturn a decision by the jury that a sentence of death is justified.

This key section, in which the jury is asked to weigh the aggravating factors against the mitigating factors in light of all the information, is similar in concept to the Florida statute upheld in *Proffitt*. Some may argue, as did the petitioner in *Proffitt*, that "it is not possible to make a rational determination whether there are 'sufficient' aggravating circumstances that are not outweighed by the mitigating circumstances * * *";[74] but the Committee concurs in the Supreme Court response to that argument:[75]

> While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given the judge and jury by this bill are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the jury's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual offense and individual defendant in deciding whether the death penalty is to be

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[74] *Proffitt* v. *Florida*, *supra* note IV 428 U.S. at 257.
[75] *Id.* at 257-258.

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imposed, the essential constitutional elements set out in *Gregg* and its companion cases.[76]

Subsection (f) provides that, in any sentencing hearing before a jury to impose the death penalty, the jury shall be instructed not to consider the race, color, national origin, creed, or sex of the defendant in determining whether the sentence of death is justified. The provision also requires each juror to certify that none of these factors was considered in reaching his or her decision. The Committee emphasizes that the delineation of these particular factors as inappropriate to be considered in determining an appropriate sentence does not imply that the list is exhaustive. Obviously, for example, the race, color, and national origin, among other factors, of the victim would also constitute inappropriate bases for imposing a particular sentence.

SECTION 3594. IMPOSITION OF A SENTENCE OF DEATH

Section 3594 provides that if the jury, or the judge, returns a finding that the death penalty is justified, the court is then to impose a sentence of death, and that in all other cases the court shall impose a sentence, other than death, authorized by law. While, by virtue of this provision, the jury finding in effect determines whether the sentence shall be death, it remains the province of the court to impose sentence. The obligation of the judge here to rely upon the unanimous finding of the jury is similar to the Georgia procedure upheld in the *Gregg* case. After careful consideration the Committee chose this procedure over the Florida approach which would permit the judge to overrule the jury finding either in favor of or against a sentence of death.

Importantly, this section provides that life imprisonment *without parole* is an authorized sentence for a conviction for an offense punishable by death under this chapter, if the maximum term of imprisonment for such offense is life imprisonment.

SECTION 3595. REVIEW OF A SENTENCE OF DEATH

Section 3595 provides the rules applicable to appeals from the imposition of the sentence of death. Under this section, a sentence of death imposed in accordance with this chapter shall be subject to review by the court of appeals upon an appeal of the sentence by the defendant. Notice of appeal must be filed within the time prescribed for the filing of a notice of appeal. This is done to permit the court of appeals to easily consolidate the sentence appeal and the appeal of the conviction. Explicit approval of such consolidation is provided. The review in capital cases is given priority over all other cases. In its review, the court of appeals must consider the entire record in the case, the procedures employed in the sentencing hearing, and the findings as to the existence of the aggravating and mitigating factors. The court of appeals must affirm the sentence where it finds that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) the information supports the jury's or court's special

[76] See *Gregg* v. *Georgia*, *supra* note 9, 428 U.S. at 188–196; *Proffitt* v. *Florida*, *supra* note 10, 428 U.S. at 251–252, 257–258.

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findings. In all other cases the court is directed to remand the case for reconsideration under the provisions of section 3593. Finally, the section requires a written statement by the court of appeals of the reasons for its disposition of the review of the sentence.

SECTION 3596. IMPLEMENTATION OF A SENTENCE OF DEATH

Section 3596 provides that a person sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General pending completion of the appeal and review process. When the sentence is to be implemented, custody of the person would be transferred to a United States Marshal to supervise imposition of the sentence in the manner prescribed by the law of the State in which the sentence was imposed, if such laws so provide; otherwise, the court would designate another State with such procedure for execution of the sentence. This carries forward part of current 18 U.S.C. 3566. The section also provides that a sentence of death shall not be carried out upon a woman while she is pregnant.

SECTION 3597. USE OF STATE FACILITIES

This section carries forward part of current 18 U.S.C. 3566 authorizing the United States to utilize State facilities and services in carrying out a Federal death penalty and to pay the costs thereof.

Section 1(b) of the bill repeals current 18 U.S.C. 3566 as covered in proposed 18 U.S.C. 3596 and 3597, and repeals 18 U.S.C. 3567 as obsolete.

Section 1(c) of the bill amends the chapter analysis of part II of title 18 to add a reference to the proposed chapter 228.

Section 1(d) of the bill amends the section analysis of chapter 227 to reflect repeal of sections 3566 and 3567 of title 18, United States Code.

Section 2 of the bill makes the bill's sentencing procedure applicable to violations of chapter 2 of title 18 of the United States Code, dealing with destruction of or damage to aircraft and motor vehicles, where death results.

Section 3 of the bill reduces the scope of the availability of the death penalty for espionage. It retains death as an authorized sentence for peacetime espionage only where it concerns certain major military matters which directly affect the national defense.

Section 4 of the bill applies the bill's new sentencing procedure to section 844(d) of title 18 of the United States Code, dealing with the transportation of explosives in interstate commerce with the knowledge or intent that such explosives will be used to injure persons or property, where death results.

Section 5 of the bill applies the new sentencing procedure to section 844(f) of title 18 of the United States Code, dealing with the destruction of government or government-related property by use of explosives, where death results.

Section 6 of the bill applies the sentencing provision to section 844(i) of title 18, United States Code, dealing with the malicious destruction by explosives of property used in interstate commerce, where death results.

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Section 7 of the bill applies the new sentencing procedure to the offense of murder in the first degree committed in the special maritime and territorial jurisdiction of the United States.

Section 8 of the bill would amend 18 U.S.C. 1116(a) to provide the death penalty for first-degree murder of a foreign official, an official guest of the United States, or an internationally-protected person, in order to make the penalty similar to the maximum penalty for Federal murder generally, and makes applicable the bill's new sentencing procedure. This offense was created by post-*Furman* legislation.

Section 9 of the bill, originating from a proposal by Senator Specter (S. 1565), adds a new section 1118 to chapter 51 of title 18 to create a new Federal offense punishable by death or by life imprisonment without the possibility of parole to murder another while confined in a Federal correctional institution unde a sentence for a term of life imprisonment. Committing murder while incarcerated on a life term is also an aggravating factor under proposed section 3592(c)(1), so that mere conviction on the substantive offense makes the death penalty available and, even if the jury or court ultimately decides the death penalty unjustified, would require imposition of a life term without the possibility of parole. The rationale for this new provision is apparent—it reflects the observation of the Supreme Court in *Gregg* v. *Georgia*, commenting on the deterrent effect of the death penalty, that "there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." [77] As stated by Senator Specter at the time he introduced S. 1565: [78]

> The bill allows the death penalty for the murder of any person such as a prison official, a prison guard, a visitor, a lawyer, a reporter, or a fellow inmate. Those violent and hardened prisoners already serving life sentences far too often feel they have "nothing to lose" in killing someone in the prison, and this legislation is sorely needed to deter that conduct.
>
> * * * * *
>
> Without a more severe punishment for such a murder than merely life imprisonment, assaults and killings will undoubtedly increase along with our growing prison population. Our Nation's correctional officers and our prisoners have the right to be protected from the violence of the most dangerous inmates. No prisoner ever should be able to feel immune from further punishment for his violent acts.

Key terms applicable to the offense are defined. "Federal correctional institution" means any Federal prison, Federal correction facility, Federal community program center, or Federal halfway house. "Term of life imprisonment" means a sentence for the term of natural life, a sentence commuted to natural life, an indeterminate term of a minimum of at least fifteen years and a maximum

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[77] *Supra* note 9, 428 U.S. at 186; see also, *Roberts* v. *Louisiana*, *supra* note 13, 428 U.S. 334 note 9; *Woodson* v. *North Carolina*, *supra* note 12, 425 U.S. at 287 note 7 and 292-293 note 25.
[78] 129 Cong. Rec. S 9489 (June 29, 1983 (daily ed.)).

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of life, or an unexecuted sentence of death. "Murder" means committing first degree or second degree murder as defined in 18 U.S.C. 1111.

Section 10 of the bill provides for the imposition of the death penalty where death results from an offense of kidnaping. The bill's sentencing procedure will apply in these cases. This is a change consistent with other felony-murder provisions in title 18. This offense had originally contained a death penalty provision, but when the section was revised in other respects in 1972 (Public Law 92-539) the death penalty provision was dropped as superfluous, since the *Furman* decision had invalidated such provisions just a few months before.

Section 11 of the bill applies the new sentencing provisions to section 1716 of title 18, United States Code, dealing with the mailing of injurious articles, where death results.

Section 12 of the bill would for the first time provide the death penalty for an attempt to kill the President of the United States if the attempt results in bodily injury to the President or otherwise comes dangerously close to killing the President and applies the new sentencing provisions to this offense.

Section 13 of the bill applies the new sentencing provisions to section 1992 of title 18, United States Code, dealing with the wrecking of trains, where death results.

Section 14 of the bill eliminates the death penalty as an authorized punishment for rape within the special maritime and territorial jurisdiction of the United States.

Section 15 of the bill restricts the applications of the penalty of death for violations of section 2113 of title 18, United States Code, concerning bank robbery and incidental crimes, to those cases where death results, and provides life imprisonment as the alternative penalty in such cases.

Section 16 of the bill applies the new sentencing procedure to aircraft piracy where death results from the commission or attempted commission of the offense. This is accomplished by repealing capital punishment sentencing procedures in title 49, while keeping the death penalty for air piracy where death results.

Section 17 of the bill provides that the new capital punishment provisions in chapter 228 of title 18 shall not apply to prosecutions under the Uniform Code of Military Justice (10 U.S.C. 801, et seq.).

IV. Amendments

(1) On page 2, line 6, after "offense" insert the following:

, as determined beyond a reasonable doubt at the hearing under section 3593.

(2) On page 2, line 11, after "defendant" insert the following:

, as determined beyond a reasonable doubt at the hearing under section 3593.

(3) On page 2, beginning on line 15 strike out subsection (3) and insert the following new subsection (3):

(3) intentionally participated in an act, contemplating that the life of a person would be taken or intending that

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lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act;

(4) On page 2, line, 20, strike "shall" and insert in lieu thereof "may".

(5) On page 2, line, 23, delete the period and add the following:

; provided that no person may be sentenced to death who was less than eighteen years of age at the time of the offense.

(6) On page 3, line, 17, strike "may" and insert in lieu thereof "shall".

V. Purpose of Amendments

Amendments 1 and 2 make it clear that the threshold criteria listed in section 3591 must be found beyond a reasonable doubt by the factfinder at the sentencing hearing held pursuant to Section 3593.

Amendment Number 3 addresses the felony-murder rule criteria for imposition of the death penalty in light of the Supreme Court's holding in *Enmund*.[79] This language conforms to the holding in *Enmund* that the defendant, in a felony-murder case, in order to be sentenced to death, must "contemplate that life would be taken" or "intend that lethal force will be employed" in the commission of the felony.[80]

Amendment Number 4 changes the bill to allow the factfinder the discretion not to impose the death penalty even though the factfinder in a hearing held pursuant to section 3593 has determined that a sentence of death is justified. This amendment, however, does not give the judge the discretion not to impose the death penalty once the jury has determined in a hearing pursuant to section 3593 that a sentence of death is justified.

Amendment Number 5 changes the bill to provide that any person who is under 18 years of age at the time of the offense may not be sentenced to death. In the bill, as introduced, the fact that a person was under 18 years of age at the time of the offense was listed as a mitigating factor.

Amendment Number 6 makes it clear that the factfinder is required to consider mitigating factors, other than the specific mitigating factors listed in section 3592(a), that are presented. This is consistent with the intent of this section of the bill.[81] The jury also has the same responsibility to consider nonstatutory aggravating factors. This section does not require that there must always be nonstatutory mitigating factors nor does it give the factfinder the authority to consider mitigating factors other than those that are presented.

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[79] *Supra* note 33.

[80] *Id.* at 801.

[81] In *Lockett Supra* note 28, the Supreme Court ruled a statute was unconstitutional because the factfinder could n ot consider other mitigating factors beyond the ones set forth in the statute.

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VI. Congressional Budget Office Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, February 27, 1986.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 239, a bill to establish constitutional procedures for the imposition of the sentence of death, and for other purposes, as ordered reported by the Senate Committee on the Judiciary, February 20, 1986.

This bill requires that when a defendant is found guilty of an offense for which one of the possible sentences is death, and the death penalty is sought by the government, the presiding judge shall conduct a separate sentencing hearing to determine the punishment to be imposed. The sentencing hearing will require the holding over of jurors, or the impaneling of a jury, which will result in the payment of additional jurors' fees by the government. However, in view of the limited number of cases affected by this provison, the additional costs incurred by the federal government are not likely to be significant.

Enactment of this bill would not affect the budgets of state and local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Rudolph G. Penner, *Director.*

VII. Regulatory Impact Statement

In compliance with paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concluded that this bill will not have any regulatory impact.

VIII. Action by the Committee

The Committee on Judiciary considered and discussed the bill on November 14, 1985, and February 20, 1986. Several amendments were considered, as discussed below. On February 20, 1986, by a vote of 12 to 6, the Committee, with a quorum present and without objection heard, ordered the amended bill reported out with the recommendation that it be passed by the Senate. The roll call vote was as follows:

YEAS (12)	NAYS (6)
Laxalt	Mathias
Hatch	Biden*
Simpson	Kennedy
East	Metzenbaum*
Grassley	Leahy*
Denton*	Simon
Specter	

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McConnell
Byrd*
DeConcini
Heflin
Thurmond

*By Proxy.

The following amendments was adopted by voice vote:

(1) Hatch Amendments to make it clear that the existence of the threshold criteria of Section 3591 must be found beyond a reasonable doubt by the factfinder at the sentencing hearing.

(2) Kennedy amendment to make it clear that the factfinder must consider all nonstatutory mitigating factors that are presented.

(3) Metzenbaum amendment, as modified by Hatch, relating to the threshold criteria for felony-murder.

(4) Simon amendment to give the factfinder the discretion as to whether to impose a sentence of death after it has determined in a hearing pursuant to Section 3593 that such a sentence is justified.

The following amendment was adopted by roll call vote as indicated:

Metzenbaum amendment to provide that a sentence of death may not be imposed upon person who was less than 18 years of age at the time of the offense.

YEAS (10)	NAYS (6)
Mathias	Laxalt
Hatch	Simpson
Denton	East
Specter	Grassley
Biden	McConnell
Kennedy	Thurmond
Metzenbaum	
DeConcini	
Leahy	
Simon	

The following amendment was defeated by roll call vote as indicated:

Metzenbaum amendment to delete the provisions that would allow the jury to consider nonstatutory aggravating factors.

YEAS (6)	NAYS (9)
Mathias*	Laxalt
Specter	Hatch
Kennedy	Simpson
Metzenbaum	East
Leahy*	Grassley
Simon	Denton*
	McConnell
	DeConcini
	Thurmond*

*By Proxy.

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Metzenbaum amendment to require unanimous agreement by the jury as to the existence of a specific statutory aggravating factor.

YEAS (5)	NAYS (10)
Mathias*	Laxalt*
Kennedy*	Hatch
Metzenbaum*	Simpson
Leahy*	East
Simon	Grassley
	Denton*
	Specter*
	McConnell*
	DeConcini
	Thurmond

*By Proxy.

Simon amendment to provide that a sentence of death shall not be carried out by hanging.

YEAS (4)	NAYS (8)
Grassley	Laxalt
Specter	Hatch
Kennedy*	Simpson
Simon	East
	Denton*
	McConnell
	DeConcini
	Thurmond

*By Proxy.

Simon amendment to provide that a sentence of death shall not be carried out by firing squad.

YEAS (4)	NAYS (8)
Grassley	Laxalt
Specter	Hatch
Kennedy*	Simpson
Simon	East
	I44Denton*
	McConnell
	DeConcini
	Thurmond

*By Proxy.

IX. Changes in Existing Law

In compliance with paragraph (12) of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 239, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

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TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

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Chapter 2.—AIRCRAFT AND MOTOR VEHICLES

• • • • • • •

§ 34. Penalty when death results

Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life [, if the jury shall in the discretion so direct, or, in the case of a plea of guilty, or a plea of a not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order].

• • • • • • •

Chapter 37.—ESPIONAGE AND CENSORSHIP

• • • • • • •

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval forces within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, *except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.*

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Chapter 40.—IMPORTATION, MANUFACTURE, DISTRIBUTION AND STORAGE OF EXPLOSIVE MATERIALS

• • • • • • •

§ 844. Penalties

• • • • • • •

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(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

* * * * * * *

(f) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years, or fined not more than $20,000 or both; and if death results shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

* * * * * * *

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment [as provided in section 34 of this title].

* * * * * * *

CHAPTER 51.—HOMICIDE

Sec.
1111. Murder.

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1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons.
1117. Conspiracy to murder.
1118. Murder by a Federal prisoner.

* * * * * * *

Chapter 51.—HOMICIDE

§ 1111. Murder

* * * * * * *

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(b) Within the special maritime and territorial jurisdiction of the United States,

[Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life] *Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;*

* * * * * * *

§ 1116. Murder or manslaughter of foreign officials, official guests, or internationally protected persons

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title except that [any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and] any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

* * * * * * *

§ 1118. Murder by a Federal prisoner

(a) Whoever, while confined in a Federal correctional institution under a sentence for a term of life imprisonment, murders another shall be punished by death or by life imprisonment without the possibility of parole.

(b) For the purposes of this section—

(1) "Federal correctional institution" means any Federal prison, Federal correctional facility, Federal community program center, or Federal halfway house;

(2) "term of life imprisonment" means a sentence for the term of natural life, a sentence commuted to natural life, an indeterminate term of a minimum of at least fifteen years and a maximum of life, or an unexecuted sentence of death;

(3) "murders" means committing first degree or second degree murder as defined by section 1111 of this title.

* * * * * * *

Chapter 55.—KIDNAPING

§ 1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101 (32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (32); or

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(4) the person is a foreign official as defined in section 1116(b) or an official guest as defined in section 1116(c)(4) of this title,

shall be punished by imprisonment for any term of years or for life *and, if the death of any person results, shall be punished by death or life imprisonment.*

* * * * * * *

Chapter 83.—POSTAL SERVICE

* * * * * * *

§ 1716. Injurious articles as nonmailable

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Whoever is convicted of any crime prohibited by this section, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life [, if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion, shall so order].

* * * * * * *

Chapter 84.—PRESIDENTIAL ASSASSINATION, KIDNAPING, AND ASSAULT

§ 1751. Presidential assassination, kidnaping, and assault; penalties

* * * * * * *

[(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.]

(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if the conduct constitutes an attempt to kill the President of the United States and results in bodily injury to the President or otherwise comes dangerously close to causing the death of the President.

* * * * * * *

Chapter 97.—RAILROADS

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§ 1992. Wrecking trains

* * * * * * *

Whoever is convicted of any such crime, which has resulted in the death of any person, shall be subject also to the death penalty or for imprisonment for life [, if the jury shall in its discretion so direct, as in the case of a plea of guilty, if the court in its discretion shall so order].

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Chapter 99.—RAPE

§ 2031. Special maritime and territorial jurisdiction

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Whoever, within the special maritime and territorial jurisdiction of the United States, commits rape shall suffer [death, or] imprisonment for any term of years or for life.

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Chapter 103.—ROBBERY AND BURGLARY

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§ 2113. Bank robbery and incidental crimes

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(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person shall be imprisoned not less than ten years, [or punished by death if the verdict of the jury shall so direct] *or if death results shall be punished by death or life imprisonment.*

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PART II—CRIMINAL PROCEDURE

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Chap.		Sec.
227.	Sentence, judgment, and execution	3561
228.	*Death sentence*	*3591*

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Chapter 227.—SENTENCE, JUDGMENT, AND EXECUTION

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3565. Collection and payment of fines and penalties.
[3566. Execution of death sentence.] *3566. Repealed.*
[3567. Death sentence may prescribe dissection.] *3567. Repealed.*
3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.

[§ 3566. Execution of death sentence

[The manner of inflicting the punishment of death shall be that prescribed by the laws of the place within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available local facilities and the services of an appropriate local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the place within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other place in which such sentence shall be executed in the manner prescribed by the laws thereof.]

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[§ 3567. Death sentence may prescribe dissection

[The court before which any person is convicted of murder in the first degree, or rape, may, in its discretion, add to the judgment of death, that the body of the offender be delivered to a surgeon for dissection; and the marshal who executes such judgment shall deliver the body, after execution, to such surgeon as the court may direct; and such surgeon, or some person appointed by him, shall receive and take away the body at the time of excution.]

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Chapter 228.—DEATH SENTENCE

Sec.
3591. Sentence of death.
3592. Factors to be considered in determining whether a sentence of death is justified.
3593. Special hearing to determine whether a sentence of death is justified.
3594. Imposition of a sentence of death.
3595. Review of a sentence of death.
3596. Implementation of a sentence of death.
3597. Use of State facilities.

§ 3591. Sentence of death

A defendant who has been found guilty of—

(a) an offense described in section 794 or section 2381 of this title;

(b) an offense described in section 1751(c) of this title, if the offense, as determined beyond a reasonable doubt at the hearing under section 3593, constitutes an attempt to kill the President of the United States and results in bodily injury to the President or comes dangerously close to causing the death of the President; or

(c) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593:

(1) intentionally killed the victim;

(2) intentionally inflicted serious bodily injury that resulted in the death of the victim; or

(3) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act;

may be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified; provided, That no person may be sentenced to death who was less than eighteen years of age at the time of the offense.

§ 3592. Factors to be considered in determining whether a sentence of death is justified

(a) MITIGATING FACTORS.—In determining whether a sentence of death is justified for any offense, the jury, or if there is no jury, the court, shall consider each of the following mitigating factors and determine which, if any, exist;

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(1) the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution;

(2) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; and

(3) the defendant was an accomplice whose participation in the offense was relatively minor.

The jury, or if there is no jury, the court, shall consider whether any other mitigating factor exists.

(b) AGGRAVATING FACTORS FOR ESPIONAGE AND TREASON.—In determining whether a sentence of death is justified for an offense described in section 3591(a), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

(1) the defendant has previously been convicted of another offense involving espionage or treason for which either a sentence of life imprisonment or death was authorized by statute;

(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; and

(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

(c) AGGRAVATING FACTORS FOR HOMICIDE AND FOR ATTEMPTED MURDER OF THE PRESIDENT.—In determining whether a sentence of death is justified for an offense described in section 3591 (b) or (c), the jury or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

(1) the death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property in interstate commerce by explosives), section 1118 (prisoners serving life term), section 1201 (kidnaping), or section 2381 (treason) of this title, or section 902 (i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472 (i) or (n)) (aircraft piracy);

(2) the defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

(3) the defendant has previously been convicted of two or more Federal or State offenses, punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person;

(4) the defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense;

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(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

(6) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;

(8) the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism; or

(9) the defendant committed the offense against—

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A) of this title, if he is in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution—

(i) while he is engaged in the performance of his official duties;

(ii) because of the performance of his official duties; or

(iii) because of his status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution of an offense.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

§ 3593. Special hearing to determine whether a sentence of death is justified

(a) NOTICE BY THE GOVERNMENT.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, he shall, a reasonable time before the trial, or before acceptance by the court of a plea of guilty, or at such time thereafter as the court may permit upon a showing of good cause, sign and file with the court, and serve on the defendant, a notice—

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

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The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) HEARING BEFORE A COURT OR JURY.—If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. Prior to such a hearing, no presentence report shall be prepared by the United States Probation Service, notwithstanding the provisions of Rule 32(e) of the Federal Rules of Criminal Procedure. The hearing shall be conducted—

(1) before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if—

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of twelve members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, and it shall consist of a lesser number.

(c) PROOF OF MITIGATING AND AGGRAVATING FACTORS.—At the hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during a trial. Any other information relevant to a mitigating or aggravating factor may be presented by either the attorney for the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. The attorney for the government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The attorney for the government shall open the argument. The defendant shall be permitted to reply. The attorney for the government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence

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of such a factor is established by a preponderance of the information.

(d) RETURN OF SPECIAL FINDINGS.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return a special finding as to each mitigating and aggravating factor, concerning which information is presented at the hearing, required to be considered under section 3592. The jury must find the existence of a mitigating or aggravating factor by a unanimous vote, although it is unnecessary that there be a unanimous vote on any specific mitigating or aggravating factor if a majority of the jury finds the existence of such a specific factor.

(e) RETURN OF A FINDING CONCERNING A SENTENCE OF DEATH.—If, in the case of—

(1) an offense described in section 3591(a), an aggravating factor required to be considered under section 3592(b) is found to exist; or

(2) an offense described in section 3591(b) or (c), an aggravating factor required to be considered under section 3592(c) is found to exist;

the jury, or if there is no jury, the court, shall then consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified.

(f) SPECIAL PRECAUTION TO ASSURE AGAINST DISCRIMINATION.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, national origin, creed, or sex of the defendant. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, national origin, creed, or sex of the defendant was not involved in reaching the juror's individual decision.

§ 3594. Imposition of a sentence of death

Upon a finding under section 3593(e) that a sentence of death is justified, the court shall sentence the defendant to death. Upon a finding under section 3593(e) that a sentence of death is not justified, or under section 3593(d) that no aggravating factor required to be found exists, the court shall impose any sentence other than death that is authorized by law. Notwithstanding any other provision of law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without parole.

§ 3595. Review of a sentence of death

(a) APPEAL.—In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under

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this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.

(b) REVIEW.—The court of appeals shall review the entire record in the case, including—

(1) the evidence submitted during the trial;

(2) the information submitted during the sentencing hearing;

(3) the procedures employed in the sentencing hearing; and

(4) the special findings returned under section 3593(d).

(c) DECISION AND DISPOSITION.—

(1) If the court of appeals determines that—

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of an aggravating factor required to be considered under section 3592;

it shall affirm the sentence.

(2) In any other case, the court of appeals shall remand the case for consideration under section 3593.

(3) The court of appeals shall state in writing the reasons for its disposition of an appeal of a sentence of death under this section.

§ 3596. Implementation of a sentence of death

A person who has been sentenced to death pursuant to the provisions of this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of such State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does so provide, and the sentence shall be implemented in the latter State in the manner prescribed by such law. A sentence of death shall not be carried out upon a woman while she is pregnant.

§ 3597. Use of State facilities

A United States marshall charged with supervising the implementation of a sentence of death may use appropriate State or local facilities for the purpose, may use the services of an appropriate State or local official or a person such an official employs for the purpose, and shall pay the costs thereof in an amount approved by the Attorney General.

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FEDERAL AVIATION ACT OF 1958

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§ 903. Venue and prosecution of offenses; procedures in respect of civil and aircraft piracy penalties

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[PROCEDURE IN RESPECT OF PENALTY FOR AIRCRAFT PIRACY

[(c)(1) A person shall be subjected to the penalty of death for any offense prohibited by section 902(i) or 902(n) of this Act only if a hearing is held in accordance with this subsection.

[(2) When a defendant is found guilty of or pleads guilty to an offense under section 902(i) or 902)n) of this Act for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraph (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government stipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists. The hearings shall be conducted—

[(A) before the jury which determined the defendant's guilt;

[(B) before a jury impaneled for the purpose of the hearing if—

[(i) the defendant was convicted upon a plea of guilty;

[(ii) the defendant was convicted after a trial before the court sitting without a jury; or

[(iii) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

[(C) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

[(3) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonexistence of the factors set forth in paragraph (6) or (7). Any information relevant to any of the mitigating factors set forth in paragraph (6) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in paragraph (7) shall be governed by the rules governing the admission of evidence at criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in paragraph (6) or (7). The burden of establishing the existence of any of the factors set forth in paragraph (7) is on the Government. The burden of establishing the existence of any of the factors set forth in paragraph (6) is on the defendant.

[(4) The jury or, or there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexis-

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tence of each of the factors set forth in paragraphs (6) and as to the existence or nonexistence of each of the factors set forth in paragraph (7).

[(5) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in paragraph (7) exists and that none of the factors set forth in paragraph (6) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in paragraph (7) exists, or finds that one or more of the mitigating factors set forth in paragraph (6) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

[(6) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that at the time of the offense—

[(A) he was under the age of eighteen;

[(B) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

[(C) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

[(D) he was a principal (as defined in section 2(a) of title 18 of the United States Code) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

[(E) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

[(7) If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that—

[(A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or

[(B) the death of another person resulted from the commission or attempted commission of the offense, and—

[(i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a sentence of life imprisonment or death was imposable;

[(ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of seriously bodily injury upon another person;

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[(iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or

[(iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner.]

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X. MINORITY VIEWS OF SENATOR CHARLES McC. MATHIAS, JR.

The Senate Judiciary Committee has once again recommended to the full Senate legislation that would revive those provisions of the United States Code that provide for the imposition of the death penalty. While prior Congresses have concluded that death is an appropriate punishment for some of the most serious crimes against the United States, the 1972 Supreme Court decision in *Furman* v. *Georgia* challenged Congress to devise constitutionally adequate procedures for imposing this most severe and irrevocable punishment. In the past, I have consistently opposed death penalty bills that did not appear to meet that challenge. Like its predecessor, the bill before us, S. 239, falls short, and I do not believe the Senate should accept it.

The proponents of S. 239 have made a sincere effort to bring this legislation up to constitutional standards. In addition, I would like to acknowledge their willingness to incorporate several amendments that make further progress toward that goal. For example, the Committee adopted language tracking the 1982 Supreme Court decision that forbids the execution of an accomplice who does not himself intend to kill. See *Enmund* v. *Florida*, 458 U.S. 782, 801. During the Committee's consideration of this amendment, Senators Hatch and Metzenbaum discussed at length the application of the so-called felony-murder rule and emerged determined to codify the *Enmund* holding. I believe it is worthwhile to point out that shortly before the Committee considered this issue, the Supreme Court handed down a decision further clarifying *Enmund*. In *Cabana* v. *Bullock*, decided on January 22, 1986, the Court reiterated that, "*Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death." Thus, the Committee's amendment in response to *Enmund* should be read in light of the Court's restatement of the governing constitutional principle as articulated in *Cabana*.

The Committee made another improvement to the bill while keeping faith with our government's international commitments. The United States has signed two international agreements that prohibit the imposition of the death penalty for crimes committed by minors. Both the International Covenant on Civil and Political Rights, adopted by the United Nations, and the American Convention on Human Rights, adopted by the Organization of American States, state that capital punishment shall not be imposed upon a person who commits a capital offense while under the age of 18. While the Senate has not yet ratified these treaties, the executive branch has made an important statement in this regard, and I commend the Committee for standing behind it. If we do not join other democratic nations as they move toward the elimination of

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the death penalty altogether, at least we should conform its application to the generally accepted minimum standards.

Despite these and other improvements made by the Committee, there are at least three serious constitutional flaws in this bill that should be rectified before the bill is reported to the full Senate.

First, like earlier bills, S. 239 authorizes the death penalty for crimes that do not result in the death of another human being. This conclusion conflicts with the thrust of the Supreme Court's decision in *Coker* v. *Georgia*, 433 U.S. 584, in which it expressed the "abiding conviction" that death is a constitutionally excessive penalty for the rapist who does not take human life. While the *Coker* decision does not lay down an explicit rule that capital punishment may not be imposed for a crime from which death does not result, the whole tenor of the opinion supports that conclusion. Indeed, Chief Justice Burger observed in his dissent that the decision "casts serious doubt upon the constitutional validity" of a statute such as S. 239. By bringing this legislation into line with *Enmund*, but not with *Coker*, we create the anomaly whereby one defendant is spared because he killed unintentionally, while another is condemned to death when he did not kill at all.

Two other constitutional infirmities arise from the provisions on "aggravating factors." In capital punishment cases, the existence of aggravating factors to justify the death penalty is analogous to the existence of an element of the underlying offense. While criminal legislation is obligated to spell out precisely every element of any criminal offense, in this instance the Committee is prepared to throw open the door to jury consideration of any aggravating factor, even those we might think inappropriate. This authority is anathema to Eighth Amendment jurisprudence, which focuses on limiting the jury's discretion in order to avoid arbitrary and capricious results. I was disappointed that the Committee declined the opportunity to correct this troubling deficiency by listing all the appropriate aggravating factors and forbidding the consideration of any others. Instead, it chose to leave a critical element to an unrestrained jury.

Finally, S. 239 permits a non-unanimous jury finding on the existence of any particular aggravating factor, whether or not it is listed in the statute. Every juror must agree that some aggravating factor exists, but only a simple majority needs to agree on what that factor is. I believe fundamental fairness requires that a jury hearing a capital case should be required to be unanimous in every particular, in all phases of the trial. This provision of S. 239 is an unacceptable and imprudent invitation to arbitrary or whimsical decision making, precisely the danger against which the Eighth Amendment protects us.

Because S. 239 does not satisfy the strictures of the above mentioned constitutional principles, I must oppose this bill.

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XI. MINORITY VIEWS OF SENATOR EDWARD M. KENNEDY

I wholly endorse the views in opposition to S. 239 expressed by Senators Metzenbaum and Simon. However, I wish to add my own views concerning two additional serious defects in the bill. In particular, I am concerned that as presently drafted the bill fails to address the issue of "death-qualified" juries.[1] It also departs from the long standing and widely established prohibition against executing an individual who, because of mental disease or defect, is unable to comprehend the reason for his or her impending execution.

Various studies conducted over the last 15 years conclusively establish that death qualified juries are consistently more likely to vote in favor of a conviction than are juries which are not death qualified.[2] In fact, there is a direct correlation between the strength of a person's support for the death penalty and his or her support for positions most favorable to the prosecution.[3]

The situation is exacerbated when one considers that whole categories of potential jurors—jurors capable of making and willing to make fair and impartial determinations of guilt or innocence—are excluded from capital jury duty. In addition to creating a more conviction prone jury, death qualification may offend the Sixth Amendment's requirement that the accused be afforded a jury composed of a cross-section of the community. More blacks than whites, and more women than men, would be excluded from jury duty through a uniform practice of death qualification.[4]

In *Wainwright* v. *Witt*,[5] the Supreme Court modified the test of *Witherspoon* v. *Illinois*,[6] which governs the exclusion of veniremen in capital cases on the basis of their views about capital punishment. The Court stated that "jurors who, though opposed to capital punishment, will conscientiously apply the law to the facts adduced at trial", may not be excluded for cause.[7] This term, the Court heard arguments in the case of *Lockhart* v. *McCree*.[8] The Court may decide that death qualification in contrary to the Sixth and Fourteenth Amendments. But regardless of the Supreme Court's ultimate determination of the minimum standards required by the

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[1] Death qualification refers to the practice of excluding for cause potential jurors who, although capable of making fair and impartial determinations of guilt or innocence, have scruples against the imposition of the death penalty.

[2] *See, e.g.*, Jurow, "New Data on the Effect of a 'Death Qualified' Jury on the Guilt Determination Process," 84 Harv. L. Rev. 567 (1971).

[3] *See, e.g.*, Bronson, "Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict?" 42 U. Col. L. Rev. 1 (1970). *See also* Fitzgerald, "Death Qualification and Jury Attitude," 8 Law & Hum. Behav. 21 (1984).

[4] *See* Louis Harris study no. 2016 (1971) (poll of 2068 adults) *and* Precision Research survey no. 1286 (1981).

[5] 469 U.S. —, 83 L.Ed.2d 841 (1985).

[6] 391 U.S. 510 (1968).

[7] 83 L.Ed.2d at 850.

[8] Docket No. 84-1865.

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Constitution, the fact remains that the death qualified jury differs from the jury normally available to criminal defendants in its ability to assure a fair determination of fact by a panel of peers drawn from a cross-section of the community. Accordingly, Congress should, as a matter of policy, forbid the practice of death qualifying juries.

In the context of the death penalty bill, this shortcoming could be remedied. Because the Senate bill establishes bifurcated trial procedures, death qualification could be prohibited during the voir dire prior to seating the jury presiding over the guilt/innocense phase of the trial, yet allowed prior to the sentencing hearing. Any jurors found ineligible to sit during this phase would be replaced by eligible alternates. While this amendment would not address my fundamental repudiation of the death penalty as a ligitimate tool of the criminal justice system, it would alleviate what I consider to be one of the most unfair aspects of its administration.

Of equal concern to me is the failure of this bill to explicitly forbid the travesty of executing an individual who, as a result of mental disease or defect, is unable to appreciate either his or her impending death, or the reason for it. Executing such an individual serves neither the deterrent nor retributive function of criminal justice. This year the Court also heard arguments on whether execution of the insane is contrary to the Fourteenth Amendment, as well as the Eighth Amendment's prohibition against cruel and unusual punishment.[9]

For at least 700 years, the common law has forbidden the execution of the mentally incompetent as a "savage and inhumane act" and as a "miserable spectacle of extreme inhumanity and cruelty" that is "repugnant to the moral tradition of western civilization." [10] Writing centuries ago, Lord Cooke felt that executing an incompetent can be no example in that it does not deter.[11] Indeed, 36 of 41 States with death penalty laws specifically forbid the execution of persons who are so mentally ill that they do not understand their impending death. The 5 others apparently provide informal procedures to prevent executing insane convicts.

Execution of those suffering from a mental disease or defect is particularly inhumane given the frequency of mistakes which occur in capital cases. The Legal Defense Fund has estimated that one-half of the more than 2,900 men and women sentenced to death since 1973 have had their sentences commuted, reversed, or vacated.[12] If mentally ill prisoners are unable to understand either their impending death or the reason for it, it is too much to ask that they contribute in a meaningful way to the preparation of appeals or habeas petitions. If society is unable to ensure that death row inmates receive adequate procedural safeguards, the finality of the ultimate sanction and the inevitability of mistake command us to forgo the execution of insane prisoners.

For these reasons, in addition to the other flaws noted in the minority views which I join, I strongly disagree with the decision of the Judiciary Committee to report this bill.

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[9] The Supreme Court will consider these issues this term. *Ford* v. *Wainwright*, Docket No. 85-5542.

[10] 4 W. Blackstone, *Commentaries on the Laws of England* 24 (1768).

[11] E. Coke, *Third Institute* 6 (1644).

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XII. MINORITY VIEWS OF SENATORS METZENBAUM, KENNEDY, AND SIMON

The Committee has recommended to the full Senate legislation to reinstitute the use of a Federal death penalty. No doubt the supporters of the bill are acting out of a sense of outrage about violent crimes. Americans are angry about crime, justifiably angry. Vicious people hurt innocent victims and they should be punished. Too often, in fact, they go undetected and unpunished. There is an understandable feeling that "we have got to do something to make the criminal laws tougher." This attitude underlies much of the support for restoring capital punishment.

The reality, however, is that the death penalty will do little or nothing to make our society safer. It *will*, however, do much to make our society less civilized and to have less respect for human life. And it will lead to irreparable mistakes in executing innocent people.

There is no reliable empirical evidence that shows the death penalty deters homicides. Even the Justice Department, which supports the death penalty, has conceded that the studies on this issue have reached conflicting results. States that have abolished the death penalty have not shown a statistically significant increase in their homicide rate.

In addition to the problem of lack of deterrence, history shows case after case where a person was convicted of murder, sentenced to death, then acquitted after new evidence proved they were innocent. There are dozens of examples but these are a few:

—Johnny Ross was sentenced to death for rape in 1975 in Louisiana when he was 15. He was released six years later when it was shown his blood type did not match that of the rapist.

—Robert McDowell was sentenced to death for the murder of a 4-year-old girl in North Carolina in 1979. Execution was stayed when the victim's mother implicated someone else.

—Four men were sentenced to die for a brutal kidnaping, rape and murder in 1974 in Arizona. Fourteen months later someone else confessed.

—Neil Shumway was hanged for murder in 1909 in Nebraska. Three years later, the victim's husband confessed to the crime.

—"Dago" Frank was executed for murder in New York in 1915. His accomplices later admitted that he was not present at the scene of the crime.

—Pietro Matera was sentenced to death for murder in 1931 in New York. He was released after 30 years in prison when the wife of the true killer confessed to having framed him.

—Gus Langley was sentenced to death for robbery and murder. Twenty-five minutes before his execution was to take place, he was released on a technicality. It was later proven he was 400 miles away at the time of the crime.

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—Samuel Williams was sentenced to death for murder in New York in 1947. He was released after almost sixteen years in prison—22 months of which were on death row—after it was revealed that his confession had been coerced.

—John Valletutti was sentenced to death in New York in 1947. His sentence was reversed on appeal when it was revealed that police had beaten him into confessing. Later the real killer confessed.

—Lloyd Miller was sentenced to death for murder in 1956 in Illinois. He was released after eleven years in prison after it was found that the prosecution had misrepresented paint smears on the defendant's clothes as blood.

The harsh reality is that it is inevitable innocent people will be convicted. Now, at least for Federal crimes, we can release them if new evidence is brought to light. With capital punishment, it is too late to rectify such a horrible social injustice.

There is another sinister aspect of capital punishment. The data show its imposition is related to race. As of July 24, 1985, 47 people had been executed since 1977, 28 white, 17 black and 2 hispanic. Although blacks and whites are victims of homicides in roughly equal numbers, 43 of 47 people executed since 1977 have been convicted of murdering whites. A study by a university of Iowa professor showed that people who killed whites in Georgia were 11 times more likely to receive the death penalty than those who killed blacks. A similar pattern occurs in other States.

In addition to the problems with the basic policy of a Federal death penalty, there are serious constitutional and procedural problems with the bill reported by the Committee.

First, S. 239 extends the punishment of death to nonhomicidal crimes. In *Coker* v. *Georgia*, 433 U.S. 584 (1977) the Supreme Court held that the punishment of death for the crime on non-homicidal rape violates the eighth amendment prohibition against cruel and unusual punishment. The clear implication of *Coker* is that death may only be imposed as punishment for crimes that involve the taking of a human life. Although treason and espionage have traditionally been viewed as crimes for which death may be imposed, the Surpreme Court decision in *Coker* casts serious doubt on the correctness of that assumption.

Second, the bill unconstitutionally fails to provide adequate guidance to the sentencing body. The Supreme Court has repeatedly held, most recently in *Zant* v. *Stephens*, 462 U.S. 862 (1983), that the fundamental and indispensable prerequisite of any constitutional death sentencing scheme is that it must provide guidelines which serve to carefully confine the discretion of the sentencing body and differentiate in a rational way those crimes which are punishable by death from those which are not. S. 239 attempts to address this concern by requiring the sentencer to find the existence of at least one statutory aggravating factor before a sentence of death may be imposed. S. 239 fails, however, to guide carefully the discretion of the sentencing body or to distinguish in a meaningful way between crimes for which the death penalty may be imposed from those crimes for which it may not, because many of the factors upon which a sentence of death may be based are overly broad.

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Third, the bill permits a death sentence to be imposed even if the jury is unable to agree on the existence of any one aggravating factor so long as all the jurors agree that some aggravating factor exists. The bill's failure to require that the jury find the existence of each aggravating factor upon which a sentence of death is based by unanimous vote is so inherently unreliable that the constitutionality of the provision is seriously drawn into question. In fact, the Justice Department advised the 97th Congress that a similar provision in S. 114 raised serious constitutional considerations.

Fourth, the bill permits the sentencer to impose the death sentence on the basis of nonstatutory aggravating factors as well as factors specifically enumerated by Congress and inexplicably does not require the jury to identify the nonstatutory aggravating factors upon which a sentence of death may be based. This provision of S. 239 is an open invitation to the very standardless exercise of discretion that the Supreme Court denounced in *Furman*. It should be noted that those cases in which the Supreme Court has upheld death sentences based on nonstatutory as well as statutory aggravating factors have done so relying heavily on the existence of procedural safeguards that are not present in S. 239. See *Zant* v. *Stephens*, 462 U.S. 862 (1983); *Barclay* v. *Florida*, 463 U.S. 939 (1983).

Unlike the statutes reviewed by the court in *Zant* and *Barclay*, the bill not only fails to require mandatory review to the highest court, in this case the Supreme Court, but the review which is accorded under the statute is limited in the issues which may be addressed. The review afforded by S. 239 is not a review of the appropriateness of the death sentence in a particular case but solely a review of whether the sentence was imposed on the basis of passion or prejudice or insufficient "information" concerning the existence of an aggravating factor. Moreover, because the jury is not required to make special findings regarding nonstatutory aggravating factors, the appellate court is precluded from engaging in even that limited inquiry regarding nonstatutory aggravating factors.

These constitutional and procedural flaws serve to heighten our concern that this legislation is fundamentally unsound as a matter of law and public policy. This legislation will not make our society safer. It will, however, go far to undermine the sanctity of human life and the respect for constitutional rights.

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